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In the

Supreme Court of the United States

October Term, 1966

No. 277

DR. FRANK M. FERRANTE,

Appellant,

v.

THE CITY OF NEW YORK, ROBERT F. WAGNER as Mayor of the City of New York, and DR. RAY E. TRUSSELL as Chairman and Commissioner of the Board of Hospitals of the City of New York,

Appellees.

On Appeal from the Court of Appeals of the State of New York

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS

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THE QUESTION IS SUBSTANTIAL

Appellees have moved to dismiss this appeal because it allegedly does not present a substantial federal question.

The federal question raised in the jurisdictional statement, where Appellant argues that it

is substantial, is whether the imposition by the City of retroactive qualifications on Appellant for continued practice in a private hospital, constitutes cruel and unusual punishment, violates due process and equal protection, constitutes punishment without trial, and violates the Ninth Amendment's reservation of rights to the people.

Appellant's arguments as to why the question is substantial are fully set forth in his jurisdictional statement, and will not be repeated here.

We shall deal here, briefly, only with those arguments made by Appellees in support of their motion.

It must be stressed that fundamentally Appellant here contests that the City has retroactively excluded him from practicing his specialty of major surgery in private hospitals despite the fact that he has done so for over fifteen years, and despite the fact that he is duly licensed by the State to practice medicine and surgery.

Although this is the essence of Appellant's constitutional attack, Appellees motion studiously avoids meeting it and instead attempts to make it appear as if this is just another case of the licensing authority imposing prospective qualifications.*

Despite Appellant's disclaimer at page 10 of his jurisdictional statement that he does not

* Appellees (at p. 4 of their motion) make it appear that the New York courts merely dismissed appellant's complaint. This is not so. Every New York court reached the constitutional issue, and held the Code in all respects constitutional (A-8, 9, R-37, 39, 45).

challenge the State's power to regulate medicine, Appellees make it appear in their Point I that he does. But he does not! He challenges the imposition of retroactive qualifications that he never had to possess before, and that by their very nature he could not possibly obtain now even if he wanted to — such as when he attended medical school having an A.M.A. approved residency.

Every case cited by Appellees in their Point I are thus wholly inapplicable, as not one deals with the imposition of retroactive qualifications on otherwise thoroughly qualified doctors, and as not one deals with a City effectively destroying a State license. Moreover, every case cited by Appellees in their Point I stands only for the proposition that a government can regulate the qualifications of those who practice in governmental hospitals, and not one of the cases even remotely involves the imposition of retroactive qualifications or the effective nullification by a lesser political subdivision of a license granted by a higher one — issues which we do face in the case now before this Court.

If Appellees had done more than simply label Appellant's Ninth Amendment argument as "frivolous," and also done more than completely avoid his "cruel and unusual punishment" and "punishment without trial" arguments, we would have found something to meet here. However, it is not possible to refute an argument that has not been made. Our position on these issues is developed in detail in the jurisdictional statement, and we stand on it.

The same is true of our "equal protection"

and "due process" arguments. Again, in their Point II argument, Appellees do not cite even one case which overcomes the showing of substantiality made in the jurisdictional statement. Appellees' terse summary of Appellant's arguments on equal protection and due process may hardly be taken as fairly representing them. They are fully set forth in the jurisdictional statement, and Appellant rests on them. It is less than satisfactory for Appellees to argue that there is no equal protection problem here because the State has now done the same thing to non-City doctors that the City has done to Appellant. This Court has never considered weight of numbers as in any way determinative of the rightness or wrongness of any given proposition. The issue is not who has done it, but whether the regulation is constitutional.

As to that inquiry here, a substantial constitutional question has been presented, and Appellees' motion should be denied.

Respectfully submitted,

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